

05-40007FDS

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE:
PROSPEED.NET, INC.
DEBTOR

FILED
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U.S. DISTRICT COURT
DISTRICT OF MASS.

CHAPTER 11
CASE NO. 03-44857-JBR

MOTION TO UNITED STATES DISTRICT COURT
FOR LEAVE TO APPEAL INTERLOCUTORY ORDER

Now comes Prospeed.Net, Inc. (hereinafter, "Prospeed") seeking this Honorable Court's permission to bring an interlocutory appeal to address whether 11 USC Section 365(b)(1) applies to the Plan of Reorganization of Prospeed as asserted by Verizon Communications, Inc. (hereinafter, "Verizon") in its Objection of the Operating Telephone Company Subsidiaries of Verizon Communications, Inc. to The Debtor's Disclosure Statement dated July 19, 2004 or whether 11 USC Section 366 preempts the application of 11 USC Section 365(b)(1) with respect to utility contracts as defined by 11 USC Section 366. In support of this Motion Prospeed states as follows:

1. This Chapter 11 Bankruptcy Case was filed on August 19, 2003, by the Debtor Prospeed.Net, Inc.

2. The Prospeed has filed an appeal from the Order of U. S. Bankruptcy Court dated December 10, 2004, denying approval of the Debtor's Motion for Approval of Disclosure Statement, in which the Honorable Judge Rosenthal specifically denied the Debtor's contention that 11 USC Section 365 (b)(1) is non-applicable to the Plan of Reorganization of the Debtor where the holder of an executory contract in arrears is a utility, rather than 11 USC Section 366, heard by the United States District Court for the District of Massachusetts.

3. Prospeed is a telecommunications provider Competitive Local Exchange Carrier (CLEC) certified to operate in the states of Massachusetts and New Hampshire. Prospeed is a facilities based (it owns its own network hardware) Internet Service Provider (ISP) operating high-speed communication Network using Digital Subscriber Line (DSL) technology. DSL technology transforms the existing copper phone lines connecting millions of homes and businesses to the global communications network into high-capacity data pipes capable of supporting broadband Internet applications. The company provides high speed internet access, network integration and other service production and hardware to under served rural and small suburban Massachusetts communities. Specifically Prospeed is focused on marketing its services to cities with very limited or no broadband internet service. These are specifically towns which the Incumbent Local Exchange Carrier (ILEC), in this case Verizon, finds uneconomical to service.

Prospect offers DSL service to both business and commercial customers utilizing Verizon existing copper wire network. This is accomplished by co-locating facilities in the Verizon Central Office (CO) as mandated by the Federal Communication Act of 1998. The equipment in this location is interconnected to a network operations center (NOC) operated by Prospect.Net as well as directly to the customer and the internet.

4. During the pendency of this case, both Prospect and Verizon have asserted that the relationship between them is subject to 11 USC 366 "Utility Service", see Motion of Verizon Communications Inc. for (A) Relief From the Automatic Stay Pursuant to Section 362 of the Bankruptcy Code to Terminate Service, Or in the Alternative (B) For Adequate Assurance of Payment For Future Utility Services Pursuant to Section 366 of the Bankruptcy Code dated September 15, 2004.

5. Pursuant to this Court's Order of September 25, 2003 as subsequently modified, Prospect has made all required adequate protection payments for post-petition services provided by Verizon.

6. In the Objection of the Operating Telephone Company Subsidiaries of Verizon Communications, Inc. to the Debtor's Disclosure Statement dated July 19, 2004, Verizon objected to various aspects of Prospect Disclosure Statement, including in paragraph 10: "... The Plan is un-confirmable for a number of reasons: (a) It fails to provide for the cure of the Debtor's substantial defaults under its agreements with Verizon as required by section 365(b)(1) of the Code if the Debtor wishes to assume those agreements and continue to provide services to its customers; ..." This theme was then developed in paragraphs 12, 13 and 14 of the Objection, which asserted that Section 11 USC Section 365(b)(1)(A), requires Prospect to pay in full its pre-petition debt to Prospect in order to continue receiving services from Verizon.

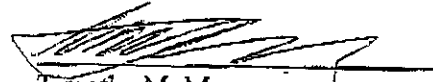
7. During the August 5, 2004 Disclosure Statement Hearing, Prospect asserted that Section 365 (b)(1) does not apply to utility services, as Section 366 specifically deals with such services, and does not require full payment of pre-petition debt to continue such relationship. 7. At the August 5, 2004 Disclosure Statement Hearing, this Court Ordered Prospect's Counsel to file a memorandum of law concerning 11 USC Section 365 versus 11 USC Section 366.

8. As the outcome of the Chapter 11 Case lies solely upon whether the Verizon debt is treated pursuant Section 366 or Section 365, it is right and necessary to allow Prospect to bring this appeal despite the fact that the Bankruptcy Court's Order of December 10, 2004 interlocutory as to the Chapter 11 Bankruptcy Case.

9. A Copy of the Bankruptcy Court's Order of December 10, 2004 is attached hereto.

10. Debtor/Appellant attempted to file this Motion for Leave to Appeal Interlocutory Order with the United States Bankruptcy Court on December 20, 2004 with the initial Notice of Appeal, but was told to await an United States District Court docket number. As there appears to be contrary opinion as to when and where to file this Motion for Leave to Appeal Interlocutory Order, Debtor/Appellant has filed this Motion with United States District Court.

WHEREFORE, Prospeed prays that the United States District Court grant Prospeed.net, Inc. leave to appeal from the Interlocutory Order referred to and that it may have such other and further relief as is just.



Timothy M. Mauser
Mauser & DiPiano, LLP
98 North Washington Street,
Suite 305
Boston, MA 02114
617-720-5585
BBO #542050

December 27, 2004
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS

In Re: Prospeed.Net, Inc.

Chapter

03-44857

Judge Joel B. Rosenthal

NOTICE OF FILING OF APPEAL TO DISTRICT COURT

A Notice of Appeal and an Election to have the appeal heard in the United States District Court were filed on **DECEMBER 20, 2004** in the above case/proceeding.

Please refer to 28 U.S.C. § 158(c)(1), Federal Rule of Bankruptcy Procedure 8001 et seq., and Local Rule 203 of the U.S. District Court. Also, pursuant to Federal Rule of Bankruptcy Procedure 8006 the Appellant must file with the Clerk of this Court, a Designation of the Record on Appeal and a Statement of the Issues to be presented on Appeal, within ten (10) days of the filing of the:

1. Notice of Appeal, or
2. Entry of an Order granting leave to appeal, or
3. Entry of an Order disposing of the last timely motion outstanding of a type specified in Rule 8002(b),

whichever is later.

A copy of the Designation and Statement shall be served by the Appellant on the Appellee.

The Appellee may file a Designation of Additional Papers to be included in the Record on Appeal within ten (10) days after service of the Appellant's Designation and Statement.

Upon the filing of Designation(s) of Record and Statement of Issues on Appeal, the Appellant (and Appellee if additional papers have been designated) shall, provide the Clerk with copies of all papers which have been designated for inclusion in the Record on Appeal within twenty-five (25) days of the issuance of this notice.

It is the duty of the parties to insure that the Record on Appeal is complete. The Clerk of the Bankruptcy Court will transmit the Record on Appeal as assembled by the parties.

Date: 12/21/04

James M. Lynch
Clerk, U.S. Bankruptcy Court

By the Court,

Anne C. Harmon
Deputy Clerk
(508) 770-8913

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE:
PROSPEED.NET, INC.
DEBTOR

CHAPTER 11
CASE NO. 03-44857-JBR

CERTIFICATE OF SERVICE


Now comes Timothy M. Mauser and hereby states that he has on December 27, 2004 caused s the enclosed copy of Debtor's Motion to United States District Court for Leave to File Interlocutory Appeal to be served upon the following, by first class mail, upon:

Mark W. Powers, Esquire
Bowditch & Dewey, LLP
Box 15156
Worcester, MA 01615

Christopher Golden
Prospeed.net, Inc.
164 Main Street
Tyngsboro, MA 01879

Office of the United States Trustee
Federal Building
446 Main Street, 14TH Floor
Worcester, MA 01601

Phillip D. Anker and Joel Millar Esq.
Wilmer, Cutler, Pickering, Hale and Dorr
399 Park Avenue
New York, NY 10022


Timothy M. Mauser, Esq.
Mauser & DiPiano, LLP
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

IN RE:
PROSPEED.NET, INC.

DEBTOR

CHAPTER 11
CASE NO. 03-44857-JBR

NOTICE OF APPEAL AND
DESIGNATION OF PARTIES

Now comes Prospeed.net, Inc. (hereinafter the "Debtor"), to give notice of its appeal to the U.S. District Court of Massachusetts, of the Order of U. S. Bankruptcy Court dated December 10, 2004, copy attached electronically, denying approval of the Debtor's Motion for Approval of Disclosure Statement, in which the Honorable Judge Rosenthal specifically denied the Debtor's contention that 11 USC Section 365 (b)(1) is non-applicable to the Plan of Reorganization of the Debtor where the holder of an executory contract in arrears is a utility. The Debtor has asserted that 11 USC Section 366 applies to a utility, rather than 11 USC Section 365, where a utility and a Debtor hold an executory contract which is material to the Debtor's business.

The names of all parties to the order appealed from and the names, addresses and telephone numbers of their respective attorneys are as follows:

1. The APPELLANT is PROSPEED.NET, INC.

Represented by : Timothy M. Mauser
Mauser & DiPiano, LLP
98 North Washington Street, Suite 305
Boston, MA 02114
617-720-5585
BBO #542050

2. THE APPELEE is the Operating Telephone Company Subsidiaries of Verizon Communication, Inc.

Represented by: Mark W. Powers, Esq.
Bowditch & Dewey, LLP
311 Main Street, PO Box 15156
Worcester, MA 01615-0156

Phillip D. Anker and Joel Millar Esq.,
Wilmer, Cutler, Pickering, Hale and Dorr
399 Park Avenue
New York, NY 10022 Phone 212-230-8800

Respectfully Submitted
PROSPEED.NET, INC.
By Its Attorney



Timothy M. Mauser
Mauser & DiPiano, LLP
98 North Washington Street, Suite 305
Boston, MA 02114
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Dated: December 20, 2004
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

IN RE:
PROSPEED.NET, INC.

DEBTOR

CHAPTER 11
CASE NO. 03-44857-JBR

CERTIFICATE OF SERVICE

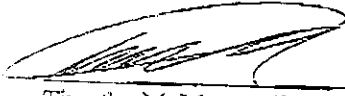
Now comes Timothy M. Mauser and hereby states that he has on December 20, 2004 caused the enclosed copy of Debtor's Notice of Appeal and Designation of Parties to be served upon the following, by first class mail, upon:

Mark W. Powers, Esquire
Bowditch & Deway, LLP
Box 15156
Worcester, MA 01615

Christopher Golden
Prospeed.net, Inc.
164 Main Street
Tyngsboro, MA 01879

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Phillip D. Anker and Joel Millar Esq.
Wilmer, Cutler, Pickering, Hale and Dorr
399 Park Avenue
New York, NY 10022



Timothy M. Mauser, Esq.
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BBO #542050

Dated: December 20, 2004
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UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

IN RE:
PROSPEED.NET, INC.

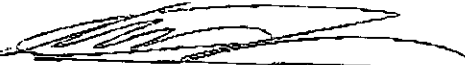
DEBTOR

CHAPTER 11
CASE NO. 03-44857-JBR

ELECTION TO HAVE APPEAL HEARD BY THE
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

Now comes Prospeed.net, Inc. (hereinafter the "Appellant"), to elect to have its appeal, filed this day, from the Order of U. S. Bankruptcy Court dated December 10, 2004 denying approval of the Debtor's Motion for Approval of Disclosure Statement, in which the Honorable Judge Rosenthal specifically denied the Debtor's contention that 11 USC Section 365 (b)(1) is non-applicable to the Plan of Reorganization of the Debtor where the holder of an executory contract in arrears is a utility, rather than 11 USC Section 366, heard by the United States District Court for the District of Massachusetts.

Respectfully Submitted
PROSPEED.NET, INC.
By Its Attorney


Timothy M. Mauser
Mauser & DiPiano, LLP
98 North Washington Street, Suite 305
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617-720-5585
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Dated: December 20, 2004
2202.25.wpd

UNITED STATES BANKRUPTCY COURT
DISTRICT OF MASSACHUSETTS
WESTERN DIVISION

IN RE:

PROSPEED.NET, INC.

DEBTOR

CHAPTER 11

CASE NO. 03-44857-JBR

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 DISTRICT OF MASSACHUSETTS

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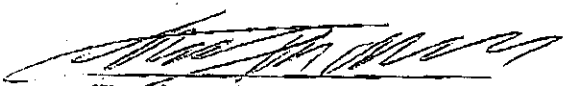
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